Gunalan a/l Ramachandran & Ors v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–19, 20, 21 OF 2004 (W)

ARIFIN ZAKARIA, RICHARD MALANJUM AND ABDUL KADIR SULAIMAN FCJJ

27 JANUARY 2006

Criminal Law — Dangerous drugs — Trafficking — Whether proved — Dangerous Drugs Act 1956 s 39B(1)(a)

Criminal Procedure — Charge — Accused persons jointly charged — Whether joint charge or charge on common intention — Whether prosecution had to prove joint possession as well as joint trafficking — Whether absence of words 'in furtherance of common intention' in the charge could be cured by s 422 of the Criminal Procedure Code — Whether accused misled or prejudiced by charge

Criminal Procedure — Charge — Joint charge — Whether joint charge or charge on common intention — Whether prosecution had to prove joint possession as well as joint trafficking

Evidence — Witness — Discrepancy in evidence — Discrepancies of prosecution witnesses — Whether discrepancies properly considered by court

On 3 February 1999, a police team on a raid of an unnumbered squatter house ('the house') and arrested the three appellants ('the accused'). Prosecution's witnesses testified that at the time of arrest, the accused were in a room sitting on the floor cross-legged with the drugs in front of them. The first and third accused in their defence stated that when the police entered the room, they were standing up and the first accused was reading an invitation card given to him by the third accused. The first accused also stated that he was moving some furniture to the house at that time and that the second accused was assisting him. The third accused supported this evidence and said that he was at the house to hand over an invitation card to the first accused. The accused were charged and convicted in the High Court for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1956. On appeal, the Court of Appeal by a majority affirmed the conviction and sentence and hence this appeal. There were two grounds of appeal, ie: (1) failure of the trial judge to consider the issue that the charge against the three accused was a joint charge; and (2) failure of the trial judge to critically scrutinize the evidence before him in coming to his decision. On issue (1), it was argued that the charge as it stood was a joint charge because it used the term 'Bahawa kamu bersama-sama …' meaning 'That you jointly….'. That being the case, it was contended for the accused that the prosecution would have to prove joint possession as well as joint trafficking.

Held, allowing the appeals:

(1) The charge was premised on common intention rather than a joint charge except that the words 'in furtherance of common intention' was missing from the charge. However, this defect in the charge was not fatal as the charge clearly stated that it had to be read together with s 34 of the Penal Code, a provision relating to criminal act committed by several persons in furtherance of a common intention. Furthermore, from the conduct of their defence, the accused had not in any manner been misled or prejudiced by the charge. Therefore, though the charges were to some extent defective but by reason of s 422 of the Criminal Procedure Code the defect although an irregularity could not possibly be said to have occasioned a failure of justice and therefore that it was not fatal to the subsequent proceedings (see para 7).

(2) The crucial evidence against the first and third accused to prove possession of the drug was the fact that the two of them were found seated cross-legged with the drug and other things in front of them when the police burst into the room. The evidence of the three were dismissed by the trial judge as mere denial and failed to cast any reasonable doubt on the prosecution case (see para 14). However, the first and third accused did in their defence emphatically stated that when the police entered the room they were standing up and the first accused was reading the invitation card given to him by the third accused. In other words, they were no where near the drug in question as stated by the prosecution's witnesses SP4 and SP6 (see para 15).

(3) There were discrepancies in the testimonies of prosecution witnesses SP4 and SP6 as to what they saw the first accused was doing when they entered the room (see para 16). The discrepancy was far from being trivial as it pertained to an activity that the prosecution relied on in order to prove knowledge of the drugs to establish possession. This discrepancy had to be considered against the evidence of the accused that when SP4 and SP6 entered the room, the first and third accused were in a standing position. This gave rise to serious doubt on the accuracy of the evidence of SP4 and SP6 (see para17). Furthermore, if it was true that on the night in question the first accused was moving his things to the house, it would support the claim by the accused that their presence in the house that night was wholly for an innocent purpose (see para 19).

[Bahasa Malaysia summary

Pada 3 Februari 1999, sepasukan polis telah menyerbu sebuah rumah setinggan tidak bernombor ('rumah itu') dan telah menangkap ketiga-tiga perayu ('tertuduh'). Saksi-saksi pihak pendakwa telah memberi keterangan bahawa pada masa tangkapan, tertuduh berada dalam bilik sedang duduk bersila atas lantai dengan dadah di hadapan mereka. Tertuduh pertama dan ketiga dalam pembelaan mereka telah menyatakan bahawa apabila polis memasuki bilik itu mereka sedang berdiri dan tertuduh pertama sedang membaca kad jemputan yang diberikan kepadanya oleh terutudh ketiga. Tertuduh pertama juga menyatakan bahawa beliau sedang memasukkan beberapa perabot dalam rumah itu pada masa itu dan bahawa tertuduh kedua membantu beliau. Tertuduh ketiga telah menyokong keterangan ini dan menyatakan bahawa beliau berada di rumah itu untuk menyampaikan kad jemputan

kepada tertuduh pertama. Tertuduh telah dituduh dan disabitkan di Mahkamah Tinggi kerana kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1956. Semasa rayuan, Mahkamah Rayuan secara majoriti telah mengesahkan sabitan dan hukuman dan justeru itu rayuan ini dikemukakan. Terdapat dua alasan rayuan, iaitu: (1) kegagalan hakim perbicaraan untuk menimbangkan persoalan bahawa pertuduhan terhadap ketiga-tiga tertuduh adalah satu pertuduhan bersama; dan (2) kegagalan hakim perbicaraan untuk meneliti keterangan di hadapannya semasa membuat keputusan. Berhubung persoalan (1), adalah dihujahkan bahawa pertuduhan itu sememangnya satu pertuduhan bersama kerana ia menggunakan terma 'Bahawa kamu bersama-sama…' yang bermaksud 'That you jointly….'. Dalam keadaan sedemikian, ia telah dihujahkan berpihak kepada tertuduh bahawa pihak pendakwa hendaklah membuktikan pemilikan bersama dan juga pengedaran bersama.]

Diputuskan, membenarkan rayuan-rayuan tersebut:

(1) Pertuduhan adalah berdasarkan niat bersama dan bukan pertuduhan bersama kecuali perkataan-perkataan 'in furtherance of common intention' yang tidak ada dalam pertuduhan. Namun, kecacatan ini dalam pertuduhan tidak mudarat kerana pertuduhan itu dengan jelas menyatakan bahawa ia hendaklah dibaca bersama s 34 Kanun Keseksaan, suatu peruntukan berkaitan tindakan jenayah oleh beberapa orang yang mempunyai nioat bersama. Tambahan pula, berdasarkan pengendalian pembelaan mereka. tertuduh tidak dalam apa carapun telah dikelirukan atau diprejudiskan oleh pertuduhan itu. Oleh itu, meskipun pertuduhan-pertuduhan tersebut terdapat sedikit kecacatan tetapi disebabkan s 422 Kanun Acara Jenayah, kecacatan itu meskipun suatu di luar aturan tidak mungkin boleh dikatakan telah mengakibatkan kegagalan berlaku adil dan oleh itu ia tidak memudaratkan prosiding seterusnya (lihat perenggan 7).

(2) Keterangan penting terhadap tertuduh pertama dan ketiga untuk membuktikan milikan dadah adalah pada hakikatnya bahawa dua daripada mereka telah ditemui duduk bersila dengan dadah itu dan barang lain di hadapan mereka semasa polis menyerbu masuk ke dalam bilik itu. Keterangan ketiga-tiganya telah ditolak oleh hakim perbicaraan sebagai penafian semata-mata dan gagal untuk menimbulkan keraguan munasabah terhadap kes pihak pendakwa (lihat perenggan 14). Bagaimanapun tertuduh pertama dan ketiga dalam pembelaan mereka telah menyatakan secara empati bahawa semasa polis masuk ke dalam bilik itu mereka sedang berdiri dan tertuduh pertama sedang membaca kad jemputan yang diberikan kepadanya oleh tertuduh ketiga. Dalam kata lain, mereka tidak berada berhampiran dadah yang dipersoalkan oleh saksi-saksi SP4 dan SP6 pihak pendakwa (lihat perenggan 15).

(3) Terdapat percanggahan dalam keterangan-keterangan saksi-saksi SP4 dan S6 pihak pendakwa berhubung apa yang mereka lihat tertuduh pertama sedang lakukan semasa mereka masuk dalam bilik itu (lihat perenggan 16). Percanggahan tersebut lebih daripada suatu yang remeh temeh kerana ia berkaitan satu kegiatan yang mana pihak pendakwa bergantung kepada bagi

tujuan membuktikan terdapat pengetahuan tentang dadah untuk menunjukkan terdapat milikan. Percanggahan ini telah dipertimbangkan dengan keterangan tertuduh bahawa apabila SP4 dan SP6 masuk ke dalam bilik itu, tertuduh pertama dan ketiga sedang berdiri. Ini menimbulkan keraguan serius tentang ketepatan keterangan SP4 dan SP6 (lihat perenggan 17). Tambahan pula, jika benar bahawa pada malam yang dipersoalkan itu tertuduh pertama sedang membawa masuk barang ke dalam rumah itu, ia menyokong dakwaan oleh tertuduh bahawa kehadiran mereka dalam rumah itu pada malam tersebut adalah berdasarkan tujuan yang baik (lihat perenggan 19).

Notes

For cases on accused persons jointly charged, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 895–894.

For cases on discrepancy in evidence of witness, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2567–2573.

For a case on joint charge, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1235.

For cases on trafficking of dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 290–391.

Cases referred to

Chota bin Abdul Razak v PP [1991] 3 MLJ 77 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489
Moh Yee Chong (f) & Anor v PP [1955] MLJ 115 (ref)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576 (refd)

Legislation referred to

Criminal Procedure Code s 170
Dangerous Drugs Act 1956 s 39B(1)(a), (2)
Penal Code s 34

Gurbachan Singh (Bachan & Kartar) for the first and second appellants.
Suresh Thanabalasingam (Kuldip & Co) for the third appelants
Abdul Wahab bin Mohamad (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Arifin Zakaria FCJ (delivering judgment of the court):

[1] The three appellants were charged in the High Court, Criminal Division, Kuala Lumpur, for an offence of trafficking in dangerous drugs, to wit 61.1g monoacetylmorphines, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1956 ('the Act') and punishable under s 39B(2) of the Act. They were found guilty by the High Court and sentenced to mandatory sentence of death. On appeal, the Court of Appeal by a majority affirmed the conviction and sentence and hence this appeal. For convenience, in this judgment I will refer to the appellants as the first, second and third accused, in the order they were referred to in the trial court.

[2] First, the narration of the prosecution case. On 3 February 1999 at around 10.25pm, a police team headed by Chief Inspector Rajendran ('SP4') raided an unnumbered squatter house at Kg Sam Yoke, Jalan Sungei Besi, Kuala Lumpur. Accompanying him were eight other police officers. On reaching the house, they found the door was opened, and upon entering the house they found 10 male Indians in the 'lounge'. They were all watching television. SP4 introduced himself as 'police' and directed his men to arrest the 10 male Indians. In the meantime, he noticed a male Indian (subsequently identified as the second accused) opening the door to the room next to the hall. In this judgment, I shall refer to it as 'the room'. SP4 then tried to push open the door but was resisted by the second accused. He then kicked open the door and rushed into the room followed by two of his men, Lance Corporal Duraiyappa ('SP6') and Detective Lance Corporal Ahmad Kamil. In the room, SP4 found two more male Indians, the first and third accused, who were sitting cross-legged on the floor, shirtless. The following items were found in the room:

(i) one big transparent plastic packet containing yellow powder and 'ketulan' suspected to be heroin;

(ii) two transparent plastic packets which have been sealed, each packet containing two bundles of small plastic packets, each bundle containing 20 small plastic packets totaling 80 and each small plastic packet contained yellow powder and 'ketulan' suspected to be heroin;

(iii) one transparent plastic bowl containing yellow powder and 'ketulan' suspected to be heroin;

(iv) one metal container of Tong Kee Brothers Confectionery' containing 56 sealed, small plastic packets each of which contained yellow powder and 'ketulan' suspected to be heroin;

(v) a transparent plastic packet containing one bundle of small plastic packets which were empty;

(vi) one pink plastic packet containing empty transparent plastic packets;

(vii) a weighing machine with a brand name of 'Tanita';

(viii) one heat-sealer with a brand name of 'impulse' which was lighted;

(ix) a bunch of six keys;

(x) a pair of scissors black in colour.

Out of these, according to SP4, the following were found in front of the first and third accused:

(a) mangkok plastik lutsinar yang mengandungi serbuk dan ketulan berwarna kuning yang disyaki dadah heroin;

(b) peket lutsinar yang berisi satu ikatan peket-peket plastik kecil yang kosong;

(c) peket plastik berwarna merah jambu berisi peket-peket plastik lutsinar yang kosong.

(d) alat penimbang digital jenama 'Tanita';

(e) 'heat-sealer' jenama 'Impulse'; dan

(f) gunting berwarna hitam.".

[3] The yellow powder and 'ketulan' (lumps) found in the plastic packets and in the plastic bowl were confirmed by the chemist to be monoacetylmorpines, one of the dangerous drugs listed in Part III, of the First Schedule of the Act, weighing 61.1grams. The three accused were accordingly charged with the offence of trafficking in the said drugs.

[4] The petition of appeals contained a number of grounds, some of which are overlapping. In these appeals, I only need to consider the two main grounds canvassed before us, these are:

(a) failure of the trial judge to consider the issue that the charge against the three accused was a joint charge; and

(b) failure of the trial judge to critically scrutinize the evidence before him in coming to his decision.

JOINT CHARGE

[5] On this issue, it was put in argument that the charge as it stands is a joint charge because it uses the term, 'Bahawa kamu bersama-sama …' meaning 'That you jointly...'. That being the case, it was contended for the accused that the prosecution will have to prove joint possession as well as joint trafficking (see s 170 of the Criminal Procedure Code ('the CPC')). Learned counsel for the first and third accused in his argument said that this matter was raised before the Court of Appeal but the court dismissed the contention merely by saying that it was not correct to say that the trial judge did not consider the issue. This contention is also adopted by the learned counsel for the second accused. Having read the judgment of the learned judge, I agree with the learned counsel for the accused that the learned judge did not at all consider the consequence of the joint charge. He only dealt with the issue of common intention.

[6] As stated by Visu Sinnadurai J in *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576 at p 588:

> One of the consequences of a joint charge is that the evidence adduced by the prosecution may not be sufficient to establish the guilt of each and every one of the accused. In cases of common intention, the prosecution need only establish that one of the accused committed the act and that the others participated in it in furtherance of a common intention. In cases of joint charges, however, the prosecution must adduce sufficient evidence to establish the guilt of each of the accused as a separate exercise.

[7] In the present case, learned counsel for the accused contended that the prosecution failed to adduce sufficient evidence to support a joint charge, therefore, on that score alone the accused ought to have been acquitted without their defence being called. I have read and reread the charge, and I must admit that at a glance, there is some ambiguity whether it is a joint charge or it is a charge premised on common intention. However, having scrutinized the charge, I am of the view that it was clear that the charge was premised on common intention rather than a joint charge except that the words 'in furtherance of common intention of you all' was missing from the charge. However, I am of the view that this defect in the charge is

not fatal as the charge clearly states that it has to be read together with s 34 of the Penal Code, a provision relating to criminal act committed by several persons in furtherance of a common intention. It is a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons: *Chota bin Abdul Razak v Public Prosecutor* [1991] 3 MLJ 77. Judging from the conduct of their defence, I do not think that the accused had in any manner been misled or prejudiced by the charge. It would appear that they have fully appreciated the charge and the prosecution case against them. Therefore, as was held in*Moh Yee Chong (f) & Anor v Public Prosecutor* [1955] MLJ 115 though the charges there were to some extent defective but by reason of s 422 of the CPC the defect although an irregularity could not possibly be said to have occasioned a failure of justice and therefore it was not fatal to the subsequent proceedings. Similarly here I think the defect in the charge did not cause any prejudice or injustice whatsoever to the accused which is not curable under s 422 of the CPC. That sufficiently disposed of the first issue raised in the appeals herein.

EVALUATION OF EVIDENCE

[8] I shall next consider the second and more formidable point raised in these appeals. It was contended for the accused that the learned trial judge failed to properly and adequately evaluate the defence evidence to see whether it had in the circumstances raised a reasonable doubt on the prosecution case as to entitle the accused to an acquittal. The Court of Appeal by a majority of two to one dismissed the accused's contention and upheld the finding of the learned trial judge. Having scrutinized both the judgments of the majority and the minority I am inclined to agree with the view of the minority for the reasons that will follow.

[9] In answer to the charge, all the three accused denied knowledge of the drug and claimed that their presence in the room at the material time had nothing to do with the drug. According to the first accused, some one and half years prior to the arrest, he operated a family restaurant in Klang, Selangor. When the restaurant business was closed down, he rented a store in Kampong Pandan to keep the restaurant furniture and other things used in the restaurant business. He decided to move the restaurant furniture and other things to the squatter house at Kampong Sam Yoke, Jalan Sungei Besi, Kuala Lumpur. The reason was because the rental at Kampong Pandan was high. He did not live in this house but he had the permission of those living there to put those things there. Those living in the said house were identified as Balan, Naga and Suresh. They were also arrested together with the accused. To move the furniture and other things, he engaged the services of one Ganesan a/l Suppaiyah ('SD4'), who owned a small lorry. Ganesan had to make two trips. The first arriving at the Jalan Sungei Besi at around 7pm and the second one arriving at around 9pm. Apart from Ganesan, he was also assisted by the second and third accused plus two or three others. They finished carrying the furniture and other things into the house at around 10pm. After that he went into the room, where he was arrested, to change his shirt, and followed by the third accused who had wanted to give him the invitation card for his brother's wedding. A short while later, the second accused entered the room. A few seconds after that, he said he heard loud noises and dog

barking, and as they were about to see what was happening outside, police entered the room and arrested them. He denied that the police had to push the door in order to gain access to the room.

[10] He also stated that at the time he was arrested he was not sitting down cross-legged facing the drug as alleged by the police. When the police entered the room, he said, he was opening the wedding invitation card. The police straight away arrested the three of them and asked them to stay in the room. The police then searched the room and found some packets in the room and asked them to whom the packets belong, they told the police they did not know. They were then punched and kicked by the police. After that, they were taken to the lounge. After searching the whole house, police also found a black pouch bag on the sofa and a paper package near a television set in the lounge. When the police opened the pouch, they found yellowish powder in small packets. In the paper package, the police found a plastic packet containing yellowish powder.

[11] The evidence of the first accused was in large measure supported by the second and third accused. The second accused told the court that he went to the house on the request of the first accused to assist him in carrying the restaurant things from the lorry into the house. He went into the room to look for the first accused to get some money to buy food. In the room, he saw the first and third accused talking to one another. About two to three seconds after he entered the room, he heard loud noises from outside, and the word 'police', and at the same time, he also heard dog barking. He then opened the door to see what was happening, and as he did so, three policemen entered the room and immediately arrested the three of them.

[12] The evidence of the third accused supports the evidence of the first and second accused. He told the court that he went to the house on the night in question to see the first accused to hand over the invitation card for his brother's wedding. On arrival at the house at Kampong Sam Yoke, he saw a number of people unloading things from the lorry, the first accused asked him to give a hand and he did so. After unloading, the things were placed in the kitchen. After that, he saw the first accused entering the room and he followed from behind. While the first accused was reading the card, the second accused entered the room. At the same time, he heard loud noises from outside and the sound of dog barking. The second accused then looked out to see what was happening and suddenly he realized policemen were standing in front of them. They were then handcuffed and told to sit while the police searched the room. The police found a square tin containing small plastic packets containing yellowish powder. He said the police also found an electric sealer. When questioned by the police, they denied that any of the things found in the room belong to them. They were then hit by the police. After that, they were taken out of the room and joined the others in the lounge who were also arrested that night. He also confirmed that the police found a black pouch near the long sofa and the pouch contained small plastic packets containing yellowish powder. He also claimed that the police found a paper package near the television set, and the package was found to contain a plastic bag containing yellowish powder and lumps of yellowish substance. Again the police

asked them to whom these items belong and all of them denied that they belong to any one of them. All of them together with the items found in the house were then taken to the police station.

[13] In our criminal law at the close of the defence cas, what the court need to decide is whether the defence had succeeded to raise any reasonable doubt on the prosecution case. If the answer is in the positive then the accused person is without more entitled to his acquittal. It has to be remembered always that at no time, except in special circumstances, the burden of proof is cast on the defence: the burden rest all throughout on the prosecution to prove its case beyond any reasonable doubt (see *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169). The issue here is whether the accused had in the circumstances raised a reasonable doubt on the prosecution case. The learned trial judge answered the question in the negative. The Court of Appeal by a majority agreed with him.

[14] In the present case, the crucial evidence against the first and third accused to prove possession of the drug is the fact that the two of them were found sitting down cross-legged on the floor, shirtless, with the drug and other appurtenances in front of them when the police burst into the room. On those facts, the trial judge found the first and third accused to be in possession of the drug. The second accused was found to be in possession of the drug pursuant to s 34 of the Penal Code on the basis of common intention. This is based solely on the allegation that he attempted to prevent the police from entering the room by pushing against the door. The evidence of the three accused were dismissed by the trial judge as mere denial and failed to cast any reasonable doubt on the prosecution case.

[15] In this case, the first and third accused in their defence emphatically stated that when the police entered the room they were standing up and the first accused was reading the invitation card given to him by the third accused. In other words, they were no where near the drug in question as stated by SP4 and SP6. This was confirmed by the second accused. To determine the reasonableness of the defence story, one need to consider the circumstances prevailing at the time the raid on the house was conducted. According SP4, the raid was carried out by a team consisting of nine officers at around 10.25pm. It is an admitted fact that one of the member of the police party was bitten by a dog outside the house. As SP4 and his team approached the house, he saw the front door of the house wide opened and they straight away rushed into the house. He noticed a number of male Indians sitting in the lounge. He then identified himself as a police officer and directed his men to arrest them. In the circumstances, I tend to agree with the defence submission that there is bound to be a lot of noises and because of that the second accused said he looked out to see what was happening. It is against that backdrop that the defence story ought to have been evaluated to see whether it cast any reasonable doubt on the prosecution case. In the circumstances, I must say that I wholly agree with what was said by Abdul Aziz JCA in his dissenting judgement which reads (at pp 524–525 of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489):

> It was submitted by counsel for the first appellant after the close of the prosecution case, whose submission was adopted by counsel for the other appellants, that in those circumstances the first and third appellants would have been aware of the presence of the

police and it was incredible that if they had been sitting cross-legged facing the drugs before the police arrived they would have continued to remain in that position when the police burst into the combing room. It was a point that merited serious consideration because even though the first and third appellants would have had only four or five seconds within which to react to the knowledge of the presence of the police, the normal reaction one would expect of a person in that situation would be instinctively instantaneous. He would instantly at least jump up and get away from the incriminating drugs. Yet the judge disposed of the point on the basis that the Chief Inspector and the other witness, the sixth prosecution witness, Detective Lance Corporal Duraiyappa, appeared to be truthful witnesses and what they said they saw must have been so. If a fact is in itself incredible it does not become any the less incredible simply because the person who relates it appears to be truthful. To accept it as true beyond reasonable doubt, to be able to entertain no doubt as to its truth, one has to have a reason for accepting it as credible in the circumstances. The judge does not say that in his judgment it was not incredible in the circumstances and give his reasons for saying so. He merely relied on the apparent truthfulness of the witnesses.

[16] The second issue raised in this appeal is the manner in which the learned trial judge dealt with the discrepancies in the testimonies of SP4 and SP6, as to what they saw the first accused was doing when they entered the room. What need to be considered is whether the discrepancies relate to material aspects of the case or otherwise. As stated in *Sarkar on Evidence* (15th Ed) p 112:

Minor discrepancies are possible even in the version of truthful witnesses and such minor discrepancies only add to the truthfulness of their evidence (see *Sidhan v State of Kerala* (1986) Cri LJ 470, 473 (Ker)). But discrepancies in the statements of wit-nesses on material points should not be lightly passed over, as they seriously affect the value of their testimony (see *Brij Lal v Kunwar* 36 A 187: 18 CWN 649: A 1914 PC 38). The main thing to be seen is whether the inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however no such benefit may be available to it (see *Krishna Pillai Sree Kumar v State of Kerala* A 1981 SC 1237, 1239: 1981 Cri LJ 734).

[17] SP4 in his evidence in chief said he saw the first accused throwing the heat-sealer on to the floor. Contrary to this, SP6 who followed SP4 closely from behind when entering the room stated in chief that he saw the first accused was in the course of putting powder into a small packet. The learned trial judge dismissed this as minor discrepancy which he said is expected of any witness and this goes to strengthen the point that they were not fabricating evidence, they were telling the truth. To him, what is important was whether the things containing the drug were in their possession at the material time. However, he went on to say that between the two he would prefer the evidence of SP4, being the first police officer to have entered the room. In this regard, I am in agreement with Abdul Aziz JCA that the discrepancy here is far from being trivial as it pertains to an activity which the prosecution relied on in order to prove knowledge of the drugs in order to establish possession. This discrepancy has to be considered against the evidence of the accused that when SP4 and SP6 entered the room the first and third accused were in a standing position. This gives rise to serious doubt on the accuracy of the evidence of SP4 and SP6, that when they entered the room the first and third accused were sitting down cross-legged facing the drug. If their attention was in fact focused on what the

two accused were doing at the material time, as they claimed, then they could not be seeing two different activities. And it is all the more telling when no empty plastic packet was ever produced in evidence.

[18] In the circumstances, I agree with the submissions of counsel for the accused that the defence had succeeded to raise a reasonable doubt in the prosecution case that when SP4 and SP6 entered the room the first and third accused were sitting cross-legged on the floor facing the drug. The question is where the drug was in fact recovered by the police, bearing in mind the defence evidence that some were recovered in the room and some in the lounge. This leads to the question whether the accused in fact had exclusive custody and control over the drug. In considering this we to have to take into account the fact that no evidence was adduced by the prosecution as to who were the actual occupier of the house. The accused in their defence maintained that Balan, Naga and Suresh were the occupiers of the house. They further said that the house is frequented by others who went there to pass their time watching television or gambling. They all had free access to the room.

[19] The other important fact that was put in defence was that on the night in question the first accused was moving his restaurant things from the store in Kampong Pandan to this new premise. If this is true, it would support the claim by the accused that their presence in the house that night was wholly for an innocent purpose. This is confirmed by SD4, Ganesan a/l Suppaiyah, who was also arrested that night but he was never charge in court. It is also in evidence that the lorry used in moving the things was still at the house when the police raided the house. SD4 told the court that when he was arrested he was waiting for payment from the 1st accused. The evidence of SD4 was not challenge by the prosecution.

[20] Quite apart from the above consideration, there is one other important factor which was not considered by the learned trial judge that is, the arrest of 10 other male Indians in the house on the same night. None of those arrested was called to give evidence for the prosecution. Their evidence could establish as to who were the actual occupiers of the house. They may also be able to establish how long the three accused had been in the room prior to the police raid. This I think is crucial to the prosecution case as no observation was made by the police prior to the raid. Unfortunately, none of them were called by the prosecution.

[21] It is against this background that the defence case ought to be tested, to see whether it has succeeded to cast any reasonable doubt on the prosecution case. The burden on the defence throughout is a light one as stated by Mohamed Azmi SCJ in *Mohamad Radhi bin Yaakob v Public Prosecutor* at p 171:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of judges rightly

prefer to adopt straightaway the legally established 'reasonable doubt' test, rather than to delve in the 'believable and convincing' test before applying the reasonable doubt test.'

CONCLUSION

[22] Considering the defence case as against the prosecution case, with all the infirmities discussed earlier, I am of the firm view that the defence had succeeded in raising a reasonable doubt on the prosecution case and hence the three accused ought not in the circumstances to have been convicted. In the result, I would allow the appeals herein and set aside the conviction and sentence imposed on the three accused. The accused are accordingly acquitted and discharged of the charge.

[23] My learned brothers, Richard Malanjum and Abdul Kadir Sulaiman FCJJ have read this judgment in draft and have expressed their agreement with it.

Appeals allowed.

Reported by Loo Lai Mee